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In The

Supreme Court of the United States

October Term, 1993

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Petitioners,

vs.

ELIZABETH McCLELLAND GANT,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES C. SPANN
Counsel of Record
SPANN, HYER, HOLLOWWA
& ARTLEY
Attorneys for Petitioners
1304 Central Avenue S.W.
P.O. Box 1031
Albuquerque, New Mexico 87103
(505) 243-3525

4943
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED FOR REVIEW

1. The January 9, 1992 Judgment of the United States District Court and the December 23, 1993 Opinion of the Tenth Circuit Court of Appeals affirming the Judgment are in conflict with the decisions of the United States Supreme Court and other United States courts of appeal that hold that federal courts have no jurisdiction to interfere with probate proceedings in state courts or control property that is in the custody of state courts.

2. The United States District Court was without jurisdiction under 28 U.S.C. § 2202 to retroactively cancel and nullify its prior judgment when the Petitioner Trustee was in full compliance with the judgment.

3. The prior judgment of the trial court and the order of the court of appeals are *res judicata* of the issues raised by the Respondent in the Motion for Further Relief.

4. In approving the award of attorneys' fees by the United States District Court under 28 U.S.C. § 2202, the Opinion of the Tenth Circuit Court of Appeals is in conflict with the Opinion of the Fifth Circuit Court of Appeals.

5. In refusing to give full faith and credit to the October 2, 1968 Judgment of the State District Court of Curry County, New Mexico, appointing the Citizens Bank of Clovis as sole trustee, the District Court Judgment and the Opinion of the Tenth Circuit are in conflict with 28 U.S.C. § 1738 and prior decisions of the United States Supreme Court.

PARTIES TO THE PROCEEDINGS

All parties are named in the caption.

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No.

In The

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October Term, 1993

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Petitioners,

vs.

ELIZABETH McCLELLAND GANT,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered on December 23, 1993.

OPINIONS BELOW

A summary of the Opinion appears at page 93, 10 C.S. 353 in the January 12, 1994 report by Barclays United States Tenth Circuit service.

STATEMENT OF JURISDICTION

The Opinion of the Tenth Circuit Court of Appeals which Petitioners seek to have reviewed is dated December 23, 1993 (Appendix A, *infra*, 1a). Jurisdiction of the Supreme Court to review the Judgment of the Tenth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Plaintiff/Respondent's Motion for Further Relief Based on Declaratory Judgment was filed pursuant to 28 U.S.C. § 2202(1) which provides:

> *Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.*

Title 28 U.S.C. § 1738 entitled, "State and territorial statutes and judicial proceedings; full faith and credit," is set forth in the Appendix (Appendix G, 32a).

STATEMENT OF CASE

The Respondent herein, a resident of Arizona, filed her declaratory judgment action against the Petitioner, Citizens Bank of Clovis, New Mexico, and Petitioner The Grand Lodge of Texas

(Ancient, Free and Accepted Masons), a corporation, to construe a will and establish her rights as a life beneficiary of a trust created by the will. Jurisdiction was alleged under 28 U.S.C. § 1332(a). The will had already been construed and Respondent's rights established by the probate court in an order entered on February 19, 1942.

The Trust is being administered by the State District Court of Curry County, New Mexico, who had appointed the Citizens Bank of Clovis as sole trustee by Order entered on October 2, 1968, without objection from Respondent (Appendix F, 29a).

In disposing of the case the United States District Court for New Mexico entered Judgment on February 10, 1988, ordering certain payments to Respondent, denying her claim for attorneys' fees, and dismissing her other claims with prejudice, including the claim that a co-trustee be appointed (Appendix E, 27a). The Judgment was appealed and affirmed by the Tenth Circuit Court of Appeals in an unpublished Opinion dated March 20, 1989 (Appendix D, 25a).

On May 17, 1991, and in the same action, the Respondent filed a so-called "Motion for Further Relief Based on Declaratory Judgment," pursuant to 28 U.S.C. § 2202, seeking, among other things, an increase in payments retroactively to 1988, plus attorneys' fees and the appointment of a co-trustee (Appendix C, 18a). At the time the Motion was filed the Petitioner Trustee was in all respects in compliance with the February 10, 1988 Judgment.

By Judgment entered on January 9, 1992, the trial court nullified its prior judgment by increasing the monthly payments to Respondent retroactively to 1988, awarding her attorneys' fees, and ordering that a co-trustee be appointed (Appendix B, 16a). The Judgment was affirmed by the Tenth Circuit Court of Appeals, which Judgment the Petitioners seek to have reviewed.

The Tenth Circuit Opinion is in conflict with opinions of the United States Supreme Court and prior opinions of the circuit courts holding that once jurisdiction of a state court over the administration of a trust has attached, such jurisdiction is exclusive.

Petitioners contended that the court by its January 9, 1992 Judgment was not granting "further and necessary" relief under its prior February 10, 1988 Judgment but was effectively nullifying what was a final judgment insofar as Respondent's claims were concerned. Further, that the trial court had no jurisdiction under 28 U.S.C. § 2202 to reconsider claims that had been resolved in the prior Judgment and when the Petitioner Trustee was in full compliance with the payment provisions of the Judgment. The court of appeals' Opinion rejected these contentions.

Petitioner's contention that the October 2, 1968 Judgment of the state district court appointing the Citizens Bank of Clovis as sole trustee was entitled to full faith and credit under 28 U.S.C. § 1738 was dismissed by the circuit court Opinion as being "without merit."

REASONS FOR GRANTING THE WRIT

I.

THE JANUARY 9, 1992 JUDGMENT OF THE UNITED STATES DISTRICT COURT AND THE DECEMBER 23, 1993 OPINION OF THE TENTH CIRCUIT COURT OF APPEALS AFFIRMING THE JUDGMENT ARE IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT AND OTHER UNITED STATES COURTS OF APPEAL THAT HOLD THAT FEDERAL COURTS HAVE NO JURISDICTION TO INTERFERE WITH PROBATE PROCEEDINGS IN STATE COURTS OR CONTROL PROPERTY THAT IS IN THE CUSTODY OF STATE COURTS.

There is no dispute about the fact that the United States District Court in this proceeding has interfered with the jurisdiction of the District Court of Curry County, New Mexico, in several respects.

a. In its February 10, 1988 Judgment it construed the will that created the trust which had already been construed by the probate court.

b. It controlled the trust property by ordering payments to the Respondent that were contrary to the decisions of the state district court.

c. In its June 9, 1992 Judgment it again construed the will to increase the payments to the Respondent, awarded her attorneys' fees, and ordered the appointment of co-trustee contrary to a prior order of the state district court approving the Citizens Bank of Clovis as sole trustee.

The court of appeals in a footnote to its December 23, 1993, Opinion expanded on the trial court's Order concerning the appointment of a co-trustee by stating in a footnote at page 5:

> We construe the court's Order as requiring Defendant, Citizens Bank, as Trustee, to apply to the state court for the appointment of a second trustee and Defendant Grand Lodge to refrain from opposing such appointment.

This statement is pure speculation and a departure from the usual and accepted course of appellate review.

An annotation in Annot., 61 A.L.R. Fed. 536, p. 551, cites numerous decisions from the United States Supreme Court and the United States Court of Appeals for the general principle that federal courts will not interfere with probate proceedings including construing wills or take control of property in the custody of state courts as the trial court has done in the present case. (*See also*, 158 A.L.R. 9 at 21.)

The present opinion is in conflict with other circuits and the Tenth Circuit's own prior opinions holding that once jurisdiction over a trust estate attaches the jurisdiction is exclusive and federal courts have no jurisdiction to interfere. *See Swanson v. Bates et al.*, 170 F.2d 648 (10th Cir. 1948); *Buck v. Hales*, 536 F.2d 1330 (10th Cir. 1976); *Lancaster v. Merchants National Bank*, 961 F.2d 713 (8th Cir. 1992); and *Princess Lida of Thurn & Taxis v. Thompson*, 59 S. Ct. 275, 280-81, 305 U.S. 456, 566, 83 L. Ed. 285 (1939).

II.

THE UNITED STATES DISTRICT COURT WAS WITHOUT JURISDICTION UNDER 28 U.S.C. § 2202 TO RETROACTIVELY CANCEL AND NULLIFY ITS PRIOR JUDGMENT WHEN THE PETITIONER TRUSTEE WAS IN FULL COMPLIANCE WITH THE JUDGMENT.

Title 28 U.S.C. § 2202, under which Respondent's motion was brought, is not a jurisdictional statute. *McGrath v. Weinberg,* 541 F.2d 249 (10th Cir. 1976). The statute authorizes a court to grant "further necessary or proper relief based on a declaratory judgment or decree." It does not authorize new or different relief from the prior judgment or decree. The prior judgment had authorized the payment to Respondent of $42,000 per year in monthly installments of $3,500 out of trust income for the year 1987 and thereafter. It denied Respondent's claim for attorneys' fees, and all of Respondent's other claims made in the action were "dismissed with prejudice." This was a final judgment on the issues raised by Respondent in the action. The trustee fully complied with this judgment when Respondent's motion was filed. There was no "necessary or proper relief" that could be granted under these circumstances.

A statute is to be interpreted according to its plain language. *See United States v. Appelbaum,* 445 U.S. 115, 63 L. Ed. 2d 250, 100 S. Ct. 948. The January 9, 1992 Judgment violates the plain language of 28 U.S.C. § 2202.

III.

THE PRIOR JUDGMENT OF THE TRIAL COURT AND THE ORDER OF THE COURT OF APPEALS ARE *RES JUDICATA* OF THE ISSUES RAISED BY THE RESPONDENT IN THE MOTION FOR FURTHER RELIEF.

Res judicata, collateral estoppel, and Law of the Case do apply to declaratory judgment actions. (*See* Annot. 10 A.L.R. 2d, p. 782, *et seq.*; 10A Wright and Miller, *Federal Practice and Procedures,* § 2771, p. 763.)

Certain issues in Respondent's motion were dismissed with prejudice by the February 10, 1988 Order. Specifically, the claim for attorneys' fees and the appointment of co-trustees were issues under the original complaint and were dismissed with prejudice. The other issue which involves the construction of decedent's will were also resolved by the Judgment under the general rule of *res judicata.* The general rule of *res judicata is* discussed in Wright and Miller, *Federal Practice and Procedures,* § 4406, vol. 18, p. 45, where *Allen v. McCurry,* 101 S. Ct. 411, 414, 66 L. Ed. 2d 308 (1980) is quoted a follows:

> Under *res judicata,* a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in that action.

(Emphasis supplied). *See also, Restatement 2nd of Judgments,* § 27, Vol. 1, p. 250. The trial court had no jurisdiction to again consider the issues raised in Respondent's Motion for Further Relief.

IV.

IN APPROVING THE AWARD OF ATTORNEYS' FEES BY THE UNITED STATES DISTRICT COURT UNDER 28 U.S.C. § 2202, THE OPINION OF THE TENTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE OPINION OF THE FIFTH CIRCUIT COURT OF APPEALS.

The February 10, 1988 Judgment directed that the Respondent and Petitioners would bear their own costs and expenses including attorneys' fees. The Respondents had filed a special motion for the court to reconsider its award of attorneys' fees and other costs, which was denied. The Tenth Circuit in its March 20, 1989, memorandum decision affirming the trial court's denial of attorneys' fees specifically affirmed this decision. By affirming the January 9, 1992 Judgment allowing attorneys' fees retroactively, the Tenth Circuit was not only in conflict with its own prior decision but with a decision of the Fifth Circuit Court of Appeals which held that in proceedings brought under 28 U.S.C. § 2201 attorneys' fees may not be awarded. *See Mercantile National Bank of Dallas v. Bradford Trust Co.*, 850 F.2d 215 (5th Cir. 1988).

V.

IN REFUSING TO GIVE FULL FAITH AND CREDIT TO THE OCTOBER 2, 1968 JUDGMENT OF THE STATE DISTRICT COURT OF CURRY COUNTY, NEW MEXICO, APPOINTING THE CITIZENS BANK OF CLOVIS AS SOLE TRUSTEE, THE DISTRICT COURT JUDGMENT AND THE OPINION OF THE TENTH CIRCUIT ARE IN CONFLICT WITH 28 U.S.C. § 1738 AND PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT.

28 U.S.C. § 1738 provides that a federal court shall give full faith and credit to the judicial proceedings of a state district court.

The United States Supreme Court has held that a federal court *must* give effect to a state court judgment if the judgment is valid under the laws of the state where rendered. *See Nugia v. Warren City School Board of Education,* 465 U.S. 75, 81, 104 S. Ct. 892, 896, 79 L. Ed. 56 (1984); and *McDonald v. City of West Brock Mich.,* 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984). The judgment of the District Court of Curry County, New Mexico, appointed the Citizens Bank of Clovis as sole trustee because the court found that "there is no necessity for a second Trustee, and that the Trust Estate will be benefited by having a sole Trustee." This judgment was entered on October 2, 1968. The Respondent never objected until the present case was filed on November 24, 1986.

The trial court's refusal to recognize or give effect to the state court Judgment by ordering that a co-trustee be appointed clearly violates the statutes and is-contrary to the Supreme Court's decisions.

CONCLUSION

This is a classic case of a United States district court taking jurisdiction over a probate matter and trust property that is being administered by a state district court that has jurisdiction under state law. This is in conflict with the United States statutes and decisions of the United States Supreme Court and other appellate courts. Certiorari should be granted under the Supreme Court's power of supervision and the decision of the Tenth Circuit Court of Appeals reversed to reaffirm these basic jurisdictional requirements.

Respectfully submitted,

CHARLES C. SPANN
Counsel of Record
SPANN, HYER, HOLLOWWA & ARTLEY
Attorney for Petitioners
1304 Central Avenue S.W.
P. O. Box 1031
Albuquerque, NM 87103
(505) 243-3525

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED DECEMBER 23, 1993

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 92-2093

ELIZABETH McCLELLAND GANT,

Plaintiff-Appellee,

v.

THE GRAND LODGE OF TEXAS, (Ancient, Free and Accepted Masons), a corporation, as trustee for Masonic Home and School of Texas; MASONIC HOME AND SCHOOL OF TEXAS; THE CITIZENS BANK OF CLOVIS, Clovis, NM, a corporation,

Defendants-Appellants.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV 86-1415 JP)

Submitted on the Briefs:

Charles C. Spann of Spann, Latimer & Hollowwa, Albuquerque, New Mexico, for Defendants-Appellants.

Milton S. Seligman of Albuquerque, New Mexico, for Plaintiff-Appellee.

Appendix A

Before SEYMOUR and KELLY, Circuit Judges, and LEONARD, District Judge.*

SEYMOUR, Circuit Judge.

Elizabeth McClelland Gant brought this diversity action against the Grand Lodge of Texas (Grand Lodge) and the Citizens Bank of Clovis (Citizens Bank) for further relief under a declaratory judgment she was previously awarded. The district court granted Ms. Gant's request. Defendants appeal, and we affirm.

I.

BACKGROUND

This suit centers on the will of Ms. Gant's grandfather, Joe McClelland. When Mr. McClelland died in 1938, he left his entire estate in trust. Under the provisions of the will, the trust income is to be distributed in the following manner: an annual payment to Ms. Gant of an amount sufficient to ensure her an adequate living during her lifetime, which the will set as $1,800.00 a year; a monthly payment of $75.00 to A.J. Nichols during his lifetime; and an annual payment to Grand Lodge of all trust income in excess of the $75.00 payment to Mr. Nichols for a period of twenty years following the death of Ms. Gant. Any excess trust income accumulates in the trust corpus. Grand Lodge will receive the remainder of the trust following the deaths of Ms. Gant and Mr. Nichols.

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* The Honorable Timothy D. Leonard, United States District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Appendix A

The will requires two trustees. Zanona Love and A.W. Skarda served as co-trustees until 1966, at which time Ms. Love retired. Mr. Skarda, who owned Citizens Bank, had the bank appointed as co-trustee. The bank was appointed as sole trustee by a 1968 order of the District Court of Curry County, New Mexico. Grand Lodge expressly consented to this appointment. Ms. Gant contends that she did not have notice of this action until many years later.

Although the will specifically set $1800.00 as the annual payment to Ms. Gant sufficient to insure her an adequate living, this amount was increased in 1948 and 1951 pursuant to a stipulation between Ms. Gant and Grand Lodge. The amount was again raised in 1960, 1968, 1973 and 1981 by order of the state court at the request of the trustees. The 1981 increase, which was the last one prior to the instant action, raised the payment to $1800.00 per month ($21,600.00 per year).

In 1986, Ms. Gant brought an action for declaratory and injunctive relief and for construction of her grandfather's will. She claimed that she was entitled to all trust income for life in excess of the amounts given to A.J. Nichols, arguing

> (a) that the will should be construed to provide her all trust income during her lifetime in excess of the income given to A. J. Nichols, or, alternatively, (b) that all such income should pass to her as a consequence of partial intestacy, or, alternatively, (c) that all such income should be paid to her under a resulting trust theory . . . .

Aplee. Supp. App. at 14 (District Court Findings of Fact & Conclusions of Law, January 9, 1988) (hereinafter 1988 Order).

Ms. Gant also asserted that a co-trustee should be appointed, and that her annual payment should be increased.

The district court held that Ms. Gant could not bring the three alternate claims quoted above for the construction of the will because she had waived those claims and they were barred by laches. However, the court concluded that Ms. Gant's request for construction of the will provision under which she was to be provided an adequate living was not barred by res judicata, waiver and estoppel, laches, or the statute of limitations. The court held that Ms. Gant was entitled to receive an annual amount sufficient to insure her an adequate living, which the court found to be $42,000.00 as of 1987, the year of the trial. The court did not address the appointment of the co-trustee, and it determined that the parties should bear their own costs and attorneys' fees. On a motion for reconsideration, the court left its 1988 order undisturbed. Both parties appealed the judgment to this court. We affirmed the district court's opinion in an unpublished order and judgment. *Gant v. Grand Lodge of Texas*, No. 88-1359, 88-1461 (10th Cir. March 20, 1988), *cert. denied*, 493 U.S. 892 (1989).

In 1991, Ms. Gant filed a motion for further relief pursuant to 28 U.S.C. § 2202, seeking an order increasing her annual payment retroactively to 1988, reconsideration of the matter of attorneys' fees, and further construction of the will, including the appointment of a co-trustee. The district court determined that the annual amount of money necessary to insure Ms. Gant an adequate living had increased since 1987 due to increases in the cost of living and due to extraordinary expenses in the form of attorneys' fees that she had incurred. Aplt. App. at 16-22 (District Court Order, January 9, 1992) (hereinafter 1992 Order). Basing its decision on expert testimony, the court set the following annual payments: $43,848 for 1988; $45,865 plus attorneys' fees of

$13,515 for 1989; $48,662 plus attorneys' fees of $5,557.50 for 1990; and, $63,420 for 1991. After determining that the will clearly intended for the trust to be managed by two trustees, the court held that "the appropriate state court with jurisdiction should appoint a co-trustee."[1] *Id.* at 19. Finally, the court ordered an annual review of Ms. Gant's circumstances by the trustees, in consultation with Ms. Gant, to determine the appropriate amount of the annual payment.

Defendants raise a number of jurisdictional and procedural arguments. They contend that the district court lacked jurisdiction to consider Ms. Gant's motion, that the previous decisions of this court and the district court bar as res judicata the issues raised in Ms. Gant's motion, and that our order of March 20, 1989, establishes the "law of the case" which the district court failed to follow. Defendants also argue that the district court erred in ordering appointment of a co-trustee because any such claim for a co-trustee was dismissed in 1988 or decided in 1968. Finally, defendants contend that the court's decision to increase Ms. Gant's annual payment is not based on substantial evidence.

II.

JURISDICTION

Defendants argue that the district court lacked jurisdiction to hear Ms. Gant's motion. Ms. Gant brought her motion under 28 U.S.C. § 2202, which states: "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after

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1. We construe the court's order as requiring defendant Citizens Bank, as trustee, to apply to the state court for the appointment of a second trustee, and defendant Grand Lodge to refrain from opposing such appointment.

reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment." Defendants base all of their jurisdictional arguments on their assertion that in ruling on Ms. Gant's motion, the court violated its 1988 order.

Defendants contend that section 2202 does not confer jurisdiction on any court but instead "provides an additional remedy where jurisdiction otherwise exists." Brief of Aplt. at 9. Defendants further maintain that the 1992 order "render[s] the prior judgment a nullity," *id.* at 10, that the 1992 order violates the 1988 rulings, *id.* at 9, and that the 1992 order contravenes Rules 59(e) and 60 of the Federal Rules of Civil Procedure, *id.* at 9-10. Defendants fail to recognize that the court's 1992 order is an additional remedy based on the 1988 declaratory judgment. Their arguments not only ignore the essential nature of section 2202, they would render that provision meaningless.

In *Horn & Hardart Co. v. National Rail Passenger Corp.*, 843 F.2d 546 (D.C. Cir.), *cert. denied*, 488 U.S. 849 (1988), the court addressed very similar arguments. The plaintiff, Amtrak, had been successful in an earlier declaratory judgment action concerning the interpretation of a lease agreement. After an unsuccessful appeal by the defendants, Amtrak filed for further relief. The defendants asserted the district court had no jurisdiction to make such an award. The court rejected this argument, stating that "[t]he 'further relief' provisions of both state and federal declaratory judgment statutes clearly anticipate ancillary or subsequent coercion to make an original declaratory judgment effective." *Id.* at 548. The court held that section 2202 " 'merely carries out the principle that every court, with few exceptions, has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective.' " *Id.* (quoting E. Borchard, *Declaratory Judgments* 441 (2d ed. 1941)).

It is clear from the 1988 rulings that the district court here intended to retain jurisdiction to enforce its decree by increasing the annual payments if necessary. Section 2202 is the mechanism by which the court may grant such further relief. While the court established the annual payment at $42,000 for 1987, the court recognized that the amount sufficient to insure Ms. Gant an adequate living is not a set number but rather will change with the current cost of living.

> Testator intended the provision of his will instructing the trustees to pay plaintiff $1,800.00 per year to be a measure of what testator believed would insure plaintiff an adequate living as of the date testator executed his Last Will and Testament but not to be a limitation on the amount of future annual payments sufficient to insure plaintiff an adequate living.

1988 Order at 4. In its 1992 order, the court stated "the annual amounts of money sufficient to insure plaintiff an adequate living. . . have increased. . . ." 1992 Order at 1. The 1992 order merely enforces the 1988 order requiring the trust to pay Ms. Gant an amount sufficient to insure her an adequate living. We hold that the district court had jurisdiction to hear Ms. Gant's motion.

III.

ATTORNEYS' FEES

In its 1988 order, the court ordered the parties to bear their own costs. On a motion for reconsideration, the court concluded that Ms. Gant was not entitled to an award of attorneys' fees under

New Mexico law. We affirmed that decision. Defendants now argue that the court's award of attorneys' fees in 1992 as part of Ms. Gant's annual payments is barred by its 1988 decision not to make such an award.

In the 1992 Order, the court awarded Ms. Gant the sum of $19,072.50 in attorneys' fees for 1989 and 1990. In doing so, the court found that "[t]he attorneys' fees paid by [Ms. Gant] were extraordinary expenses which, if not at least partially reimbursed to her, would cause [Ms. Gant] to receive less than an amount sufficient to insure [Ms. Gant] an adequate living as intended by the testator." 1992 Order at 2. The court found that "[r]eimbursement of 50% of the attorneys' fees expenses paid by [Ms. Gant] during 1989 and 1990 would be an amount sufficient to insure [her] an adequate living as intended by the testator." *Id.* at 3.

Defendants contend that the district court was barred from making this determination by the doctrines of res judicata and law of the case. We disagree. "[O]rdinary principles of claim preclusion do not apply to § 2202 actions given their clear purpose of supplementing declaratory relief." *Horn & Hardart Co.*, 843 F.2d at 549.

> The Declaratory Judgment Act provides that further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by the judgment. This is broad enough to permit the court to grant additional relief long after the declaratory judgment has been entered, provided that the party seeking relief is not barred by laches. *The declaratory*

> *judgment does not merge a claim in the judgment or bar it.* Accordingly, the rule permits the original judgment to be supplemented either by damages or by equitable relief even though coercive relief might have been available at the time of the declaratory action. It authorizes the court to grant relief that was not demanded or relief that was not even proved in the original declaratory judgment action. *It permits the court, even in a diversity case, to grant further relief although this could not be done in the state courts.* Any additional facts that may be necessary to support the award of further relief can be proved on the hearing provided for by the statute.

10A C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure*, § 2771, at 765-67 (2d ed. 1983) (footnotes omitted) (emphasis added) (hereinafter Wright & Miller).

The award challenged here is supported by both the cumulative nature of the additional relief authorized by section 2202 and the court's rationale for granting such relief in 1992. In the 1988 proceeding, Ms. Gant argued that she was entitled to the attorneys' fees she had incurred *in that action* as a matter of state law, but the court held that state law did not provide for a fee award under the circumstances. In the 1992 proceeding, however, the district court did not grant attorneys' fees as such under state law. Rather, the court viewed the amount of fees incurred in years *subsequent* to the years at issue in 1988 as extraordinary expenses requiring a raise in Ms. Gant's annual payments to insure that she continued to receive the adequate annual income mandated by the

will. The court stated that "[t]he attorneys' fees paid by plaintiff were extraordinary expenses which, if not at least partially reimbursed to her, would cause plaintiff to receive less than an amount sufficient to insure [her] an adequate living as intended by the testator." 1992 Order at 2. The 1992 order thus pertained to different years, was supported by a different rationale, and was encompassed in the broad authority conveyed by section 2202. Accordingly, the court's ruling that attorneys' fees are not available under state law did not preclude the court from subsequently determining that Ms. Gant was entitled to reimbursement for fees to effectuate the terms of the will.[2]

Defendants also argue that the award of fees in this diversity action is governed by state law and is not otherwise authorized by section 2202. As quoted above, however, section 2202 "permits the court, even in a diversity case, to grant further relief although this could not be done in the state courts." 10A Wright & Miller § 2771, at 767. Indeed, this court has specifically held that a court has the power in a diversity case to award fees as damages under section 2202 even though they are not recoverable under state law. *See Security Ins. Co. v. White*, 236 F.2d 215, 220 (10th Cir. 1956). "[T]he grant of power contained in [section 2202] is broad enough to vest the court with jurisdiction to award damages where it is necessary or proper to effectuate relief based upon the declaratory judgment rendered in the proceeding." *Id.*

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2. Our rejection of defendants' res judicata argument also disposes of their argument based on law of the case. We note in addition that the doctrine of law of the case is not a limit on the power of the court but is solely a rule of practice to be applied with good sense. *See Moore v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1941 (1992).

Appendix A

IV.

CO-TRUSTEE

Defendants contend that the district court's order requiring the appointment of a co-trustee is barred by its 1988 order. Ms. Gant requested the appointment of a co-trustee in her original complaint. In the 1988 order, the court stated "[a]ll claims of [Ms. Gant] other than her claim for an annual amount sufficient to insure [sic] her an adequate living . . . are hereby dismissed with prejudice." February 1988 Order at 2. Although other claims of Ms. Gant were discussed and decided in that order, the court did not mention Ms. Gant's request for a co-trustee. In fact, the district court in 1992 determined that the "issue of co-trustees was not decided by the judgment entered herein on February 10, 1988 and plaintiff's request for a declaratory judgment on this issue is not barred by the doctrine of res judicata." 1992 Order at 4.

Defendants argue that, due to the dismissal language in the 1988 order, res judicata bars the 1992 order directing appointment of a second trustee. However, "[i]n declaratory judgment actions familiar principles of *res judicata* cannot be applied automatically to judgments dismissing suits without stated reasons." *Security Mut. Casualty Co. v. Century Casualty Co.*, 621 F.2d 1062, 1066 (10th Cir. 1980). As we pointed out in Part III supra, the broad grant of authority provided by section 2202 permits the court to order relief even though such relief "might have been available at the time of the declaratory action. It authorizes the court to grant relief that was not demanded or relief that was not even proved in the original declaratory judgment action." 10A Wright & Miller § 2771, at 766-67. Accordingly, defendants' res judicata argument is without merit.

Defendants also make two arguments based on the 1968 state court order appointing Citizens Bank as the sole trustee. First, defendants argue that because the state court exercised its jurisdiction in 1968, the federal court was without jurisdiction to appoint a co-trustee. Second, defendants assert that Ms. Gant is barred from seeking to set aside the state court order by limitations, laches, estoppel, or waiver. Both arguments are without merit.

We begin by observing that federal courts have broad equity jurisdiction and "may entertain actions against administrators, executors, or other claimants in which plaintiffs seek to establish claims against an estate." 13B Wright & Miller § 3610, at 484. Further, "federal courts have employed their equitable jurisdiction [in] actions requesting the construction of wills." *Id.* at 501-504; *see, e.g., Markham v. Allen,* 326 U.S. 490, 494 (1946); *National Audubon Soc'y Inc. v. Marshall,* 424 F.2d 717, 719-20 (5th Cir. 1970) (per curiam).

Defendants cite *Swanson v. Bates,* 170 F.2d 648 (10th Cir. 1948), for the premise that exclusive jurisdiction to appoint a trustee rests with the state courts. In *Swanson,* the trustee filed the trust report in the state court and a hearing date was set. Before the hearing could be held, the trust beneficiary filed an action in federal court; to remove the trustee. We noted that the final accounting of the trust was pending in state court and "*so long as [the proceedings] pended,* they gave to the state court exclusive jurisdiction over the trust estate, and the court below was without jurisdiction to [remove the trustee]." *Id.* at 651 (emphasis added). There are no pending state proceedings here and *Swanson* is therefore not on point.

Defendants also contend that as a result of the 1968 state court order, Ms. Gant is barred by limitations, laches, estoppel, and

waiver from now seeking appointment of a second trustee. As a general rule, express trusts are not subject to statutes of limitation. *See* G. Bogert & G. Bogert, *The Law of Trusts & Trustees* § 951 (rev. 2d ed. 1982).

> During the life of an express trust, if the trustee is executing the trust in accordance with its terms, there is no cause of action in favor of the beneficiary. He could not maintain an action against the trustee to compel enforcement of the trust, or for damages for breach of it, because the trust is being carried out and there has been no breach. Until there is a cause of action, there is no occasion for the application of the Statute of Limitations.

Id. § 951, at 547. The record in this case reveals that during the years after the Bank was appointed as sole trustee, it increased Ms. Gant's annual payment several times before it stopped doing so. Defendants do not allege that Ms. Gant failed to timely file her declaratory judgment action once she determined that the Bank was no longer willing to comply with the terms of the trust. Accordingly, we are not persuaded by defendants' limitation argument. Defendants' attempt to invoke the equitable doctrines of laches, estoppel, and waiver is similarly unavailing. Defendants simply fail to recognize that Ms. Gant did not suffer any damages until the sole trustee failed to perform its fiduciary duties. Ms. Gant should not be penalized for waiting until she was harmed by the lack of a second trustee before filing a claim.

Appendix A

V.

ANNUAL PAYMENTS

Defendants maintain that the district court's order increasing the amount of the annual payment to Ms. Gant is not supported by substantial evidence. The court's determination of the amount necessary to provide Ms. Gant an adequate income is a fact finding which we may only disturb on appeal if it is clearly erroneous. Fed. R. Civ. P. 52(a). " 'A finding of fact is not clearly erroneous unless it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made.' " *Heim v. State of Utah*, No. 92-4134, 1993 WL 467863, at *1 (10th Cir. Nov. 16, 1993) (quoting *Las Vegas Ice Cold Storage Co. v. Far West Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990)). Ms. Gant's expert witness, Dr. David Hamilton, testified as to the current cost of living and the cost of living in 1938. Dr. Hamilton considered many factors, including the Consumer Price Index (CPI), to determine the 1987 equivalent of $1800 in 1938. Aplee. Supp. App. at 38-41. The CPI is used to adjust social security, federal retirement, and military retirement benefits. *Id.* at 21, 37. Ms. Gant also testified as to her expenses. *Id.* at 23-30. This evidence is clearly sufficient to support the district court's determination. Moreover, our review of the record does not leave us with a definite and firm conviction that the district court was mistaken in that determination.

Finally, we are compelled to observe that although defendants purport to recognize that they are required to accept and comply with the district court's 1988 construction of the will, their arguments in this action mischaracterize and take issue with that ruling. In light of this disturbing recalcitrance, we believe it appropriate to point out that the Bank as trustee has a fiduciary

obligation to Ms. Gant. The court declared the nature of that obligation in 1988 in a decision which has become final. Under that order, the trustees must pay Ms. Gant an annual amount that is sufficient to insure her an adequate income. Because this amount may vary from year to year, the trustees are required to ascertain that amount annually in consultation with Ms. Gant as directed by the district court.

The judgment of the district court is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED JANUARY 9, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV NO. 86-1415 JP

ELIZABETH MCCLELLAND GANT,

Plaintiff,

vs.

THE GRAND LODGE OF TEXAS, (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, CLOVIS, NEW MEXICO, a corporation,

Defendants.

JUDGMENT

Having made Findings of Fact and Conclusions of Law entered this date, following an evidentiary hearing on December 6, 1991, in accordance with the Findings of Fact and Conclusions of Law it is:

ORDERED, ADJUDGED AND DECREED that:

1. Defendant Citizens Bank of Clovis, New Mexico, trustee of the Joseph C. McClelland, Testamentary Trust, shall pay to plaintiff in a lump sum, the difference between what it has already

paid to plaintiff for living expenses during the years 1988, 1989, 1990 and 1991 and the following:

1988 - $43,848

1989 - $45,865 plus attorneys' fees of $13,515 and applicable gross receipts taxes thereon.

1990 - $48,662 plus attorneys' fees of $5,557.50 and applicable gross receipts taxes thereon.

1991 - $63,420.

2. A co-trustee shall be appointed by a state court having jurisdiction to satisfy the intent of the testator, as expressed in his Last Will and Testament, that "two trustees shall always be in charge and management of the trust estate . . ."

3. Within 60 days of the beginning of each calendar year, the co-trustees shall, after consultation with the plaintiff, determine the annual amount sufficient to insure plaintiff an adequate living for that year, taking into consideration general cost of living changes and extraordinary expenses the plaintiff reasonably expects to incur during the year.

s/ James A. Parker
UNITED STATES DISTRICT JUDGE

APPENDIX C — MOTION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED MAY 17, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CV No. 86-1415 JP

ELIZABETH McCLELLAND GANT,

Plaintiff,

vs.

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, CLOVIS, NEW MEXICO, a corporation,

Defendants.

MOTION FOR FURTHER RELIEF
BASED ON DECLARATORY JUDGMENT

Elizabeth M. Gant, plaintiff in the above entitled action, in which a declaratory judgment granting plaintiff certain relief was issued by this Court on February 10, 1988 (followed by appeals by plaintiff and defendant to the United States Court of Appeals for the 10th Circuit, which on March 20, 1989 affirmed the Judgment of this Court in all respects, followed by a petition by defendants for rehearing denied May 11, 1989, followed by a petition to the Supreme Court of the United States by defendants for a Writ of Certiorari, which Court on October 10, 1989 denied said Petition,

following which a mandate was duly issued directing this Court to enforce its said Judgment of February 10, 1988), now moves the Court by her undersigned attorney, for further necessary and proper relief against said defendants based on such declaratory judgment and the findings and conclusions of the Court in support thereof.

This Motion is made under the provisions of Title 28, Section 2202, of the United States Code, and is based on the following grounds:

1. The February 10, 1988 Judgment declared that plaintiff is entitled to an annual amount payable from the Testamentary Trust created by Joe C. McClelland, of which defendant Citizens Bank of Clovis, New Mexico is presently trustee, sufficient to insure plaintiff an adequate living, that this Court held that as of 1987, $42,000 annually was sufficient to insure plaintiff an adequate living, and that plaintiff and defendants should bear their own costs and expenses, including attorney fees; that although the cost of living has increased since 1987 at an average rate of more than 4.7% per year, and the level of living has substantially increased, defendant The Grand Lodge of Texas (Ancient, Free and Accepted Masons) [The Grand Lodge A.F. and A.M.] refuses to meet with plaintiff to discuss an increase in the annual amount necessary to insure plaintiff an adequate living, and insists that only the Court can make such a determination.

2. Defendant The Citizens Bank of Clovis, New Mexico [Citizens Bank] has repeatedly paid attorney fees out of the trust estate for legal services in this litigation rendered in 1986 and subsequent years by the attorneys representing the defendants despite this Court's Order and despite the fact that defendant Citizens Bank and defendant The Grand Lodge A.F. and A.M. were

represented by the same attorneys; the matter of payment of attorney fees is entitled to reconsideration by the Court, in order that attorney fees and costs may also be awarded to plaintiff, as authorized by Section 46-3-12.A.(4) and Section 46-3-12.C.(6) NMSA 1978, or in order that the Court order that defendants individually reimburse the trust estate for all attorneys' fees and expenses expended.

3. The January 7, 1988 Findings of Fact and Conclusions of Law made by this Court construed said decedent's Will to intend the bequest and devise to the The Grand Lodge A.F. and A.M. for the benefit of the Masonic Home and School to be a gift to an orphanage for the establishment of a memorial in the memory and honor of decedent's son, the father of plaintiff (Findings of Fact 8, 9, and 10); decedent's Will does not state any details as to the memorial, and defendant The Grand Lodge A.F. and A.M. refuses to meet with plaintiff, the only person involved who knew her father and has an interest in such memorial, as to making plans for such a memorial, and said defendant proposes to use said bequest and devise for "operating expenses" rather than as a "memorial".

4. The Trustee acquired from the decedent's estate and has retained certain improved real estate in Plainview, Texas comprising a McClelland Family Mausoleum in which various members of plaintiff's family have been buried and in which plaintiff and her descendants are entitled to be buried, the maintenance of which Mausoleum requires the payment of certain annual expenses and arrangements extending into the future past the time of plaintiff's death; defendant The Grand Lodge A.F. and A.M. refuses to meet with plaintiff to discuss the use or maintenance of said Family Mausoleum although plaintiff has the pertinent information from other family members and is the proper person to furnish information as to burials, which include the

burial place of her father, her father's parents, and other relatives of hers, and that neither of the defendants is properly informed or sufficiently interested to make such arrangements or to control said Mausoleum.

5. Decedent's Will dated in 1938 named two individuals, Zanona Love, an aunt of plaintiff, and J. A. Nichols, a friend of decedent, as executors of his Will and trustees of the trust created therein; both of them were personally known to plaintiff and to her family; Item Three of said Will designated Zanona Love and J. A. Nichols as trustees of the trust estate created in the Will and Item Seven of the Will specifically states that it was the intention of testator to "have two trustees to administer the trust estate hereby set up and created at all times" and that "two trustees shall always be in charge and management of the trust estate." An additional trustee should be appointed and, since Citizens Bank in its capacity as trustee is aligned with and partial to the remainder beneficiary, it would be equitable that the second trustee of the trust be an impartial person not objectionable to plaintiff. This Court should construe the Will as requiring two trustees and should order the parties to attempt to agree on a second trustee and in the absence of agreement to apply to the Ninth Judicial District Court of New Mexico for the appointment of a second trustee.

6. That plaintiff is over 70 years of age and has had various ailments which have resulted in substantial medical, surgical, and hospital expenses. Payment of these expenses have increased the amount required to assure plaintiff an adequate living. Such expenses may be expected in the future and an actual controversy exists between the plaintiff and the defendants as to the obligation of the trustee to pay plaintiff amounts to cover such medical, hospital and surgical expenses. Plaintiff is entitled to a construction of the trust as requiring the trustee to pay plaintiff's

hospital, surgical, and extraordinary medical expenses without an application to the Court on each such emergency, in addition to the monthly payment required to assure her an adequate living.

WHEREFORE, plaintiff moves the Court for an Order as follows:

1. Declaring that plaintiff is entitled to an amount in excess of $42,000 per annum to insure her an adequate living based upon the increase in cost of living and in level of living since 1987, retroactive to the beginning of 1988, in the amount of $1,722 for 1988, $3,820 for 1989, and $6,385 for 1990, and $9,094 for 1991.

2. Declaring that plaintiff is entitled to an annual review as to the amount necessary to insure her an adequate living and directing the trustee to make such review in consultation with plaintiff within the first forty-five days of each calendar year.

3. Declaring that plaintiff is entitled to an award of reasonable attorneys fees for services rendered in connection with this declaratory judgment action, including services rendered in connection with this Motion; or, if the Court declines to award attorneys fees to plaintiff, ordering defendants to reimburse the Trust for amounts paid out of the Trust in connection with this declaratory judgment action to the attorneys for the trustee and the The Grand Lodge A.F. and A.M.

4. Declaring that the Will does not permit the income after plaintiff's death, and the remainder of the trust estate 20 years after the death of plaintiff,to be distributed by the trustee to the The Grand Lodge A.F. and A.M. for "operating expenses" of the Masonic Home and School, but requires that such devise and bequest be known and designated as a "memorial" for decedent's

son (plaintiff's father) and ordering the defendants to discuss with plaintiff the nature of the Memorial to be established, and reserving jurisdiction to make further Order in the event agreement cannot be reached on the nature of the Memorial.

5. Declaring that the McClelland Family Mausoleum in Plainview, Texas is real estate of the Trust Estate to be retained by the trustee and that the remainderman, The Grand Lodge A.F. and A.M., is required after the termination of the Trust to provide for the care and maintenance of said Mausoleum or that provision for future care and maintenance be arranged at this time, and ordering defendants to discuss with plaintiff arrangements to be made with respect to the Mausoleum.

6. Declaring that the Will requires that there should be two trustees at all times and ordering the parties 1) to attempt to agree on an additional trustee and after agreement or in the event of failing to so agree, 2) to apply to the Ninth Judicial District Court of the State of New Mexico for the appointment of an additional trustee, as agreed upon or as selected by the Judge of said Court.

7. Declaring that plaintiff is entitled to have paid out of the Trust the reasonable and necessary expenses incurred by her for hospital and surgical treatment and other extraordinary medical expenses, in addition to the monthly payment required to assure her an adequate living.

8. Granting plaintiff such other and further relief as equity may require and to the Court shall seem proper.

CONCURRENCE OF OPPOSING COUNSEL, CHARLES C. SPANN, ESQUIRE, WAS VERBALLY REQUESTED BUT DENIED.

Appendix C

s/ Milton S. Seligman
Milton S. Seligman
Attorney for Plaintiff
400 Gold Avenue SW, Suite 1200-W
Albuquerque, NM 87102
(505) 242-6784

I hereby certify that a true copy of
the foregoing was mailed to Charles
C. Spann, opposing counsel of record,
this 17th day of May, 1991.
s/ Milton S. Seligman
Milton S. Seligman

APPENDIX D — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED MARCH 20, 1989

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-1359 & 88-1461
(D.C. No. 86-1415-JP)
(D. N.M.)

ELIZABETH MCCLELLAND GANT,

Plaintiff-Appellee-Cross-Appellant,

v.

THE GRAND LODGE OF TEXAS, (Ancient Free and Accepted Masons), a corporation as trustee for Masonic Home and School of Texas; MASONIC HOME AND SCHOOL OF TEXAS; THE CITIZENS BANK OF CLOVIS, Clovis, N.M. a corporation,

Defendants-Appellants-Cross-Appellees.

ORDER AND JUDGMENT*

Before McKAY, SEYMOUR, Circuit Judges, and PHILLIPS, District Judge.**

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** Honorable Layn R. Phillips, District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

Appendix D

Plaintiff Elizabeth McClelland Gant cross-appeals the judgment of the District Court construing the will of her grandfather, Joe C. McClelland. Defendant Grand Lodge of Texas appeals from the same judgment.

Plaintiff also seeks attorney's fees as the prevailing party, which the district court denied. After reading the briefs, examining the record, and hearing oral argument, we are not persuaded that the trial court erred. We affirm the judgment below in all respects, substantially for the reasons given by the district court in its Findings of Fact and Conclusions of Law issued January 10, 1988, and its Memorandum Opinion issued February 10, 1988.

Entered for the Court

Stephanie K. Seymour
Circuit Judge

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO FILED FEBRUARY 10, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CV No. 86-1415 JP

ELIZABETH McCLELLAND GANT,

Plaintiff,

vs.

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Defendants.

JUDGMENT

This case was tried on its merits, non-jury, on December 17, 1987. Findings of Fact and Conclusions of Law were filed on January 7, 1988. Thereafter plaintiff requested reconsideration of the ruling that the parties should bear their own attorneys fees and costs; the request was reconsidered and the ruling was not changed. Defendants filed a motion to amend finding of fact No. 13 and that motion was denied. By letters to the court the parties have agreed that the annual amount payable from the trust to the plaintiff may be paid in monthly installments.

In accordance with the Findings of Fact and Conclusions of Law it is therefore

Appendix E

ORDERED, ADJUDGED AND DECREED:

1. Defendant Citizens Bank of Clovis, New Mexico, Trustee of the Joseph B. McClelland Testamentary Trust, shall pay to the plaintiff the sum of $42,000 per year in monthly installments of $3,500 out of trust income, or out of trust corpus if that becomes necessary, for the year 1987 and thereafter until the further order of this court or another court which has jurisdiction.

2. All claims of the plaintiff other than her claim for an annual amount sufficient to insure her an adequate living, which was determined to be $42,000 as of 1987, are hereby dismissed with prejudice.

3. Plaintiff and defendants shall bear their own costs and expenses, including attorneys fees.

s/ James A. Parker
District Judge

APPENDIX F — ORDER OF THE DISTRICT COURT OF CURRY COUNTY, STATE OF NEW MEXICO FILED OCTOBER 2, 1968

No. 6857

IN THE MATTER OF THE TRUST ESTATE CREATED BY THE LAST WILL AND TESTAMENT OF JOE C. McCLELLAND,

Deceased.

ORDER

The matter of the Annual Report of Trustees, The Citizens Bank of Clovis, Clovis, New Mexico, a corporation, and Lynell G. Skarda, as Executor of the Estate of A. W. Skarda, deceased, concerning the business of the Estate for the calendar year 1967 having been submitted to the Court, and the Court having considered the same and examined Exhibit A attached thereto, and being otherwise fully advised in the premises, finds:

That said Annual Report for 1967 should and ought to be approved, and the power, authority, and duties of the Trustee hereinafter named should be continued as heretofore authorized by this Court;

That A. W. Skarda, one of the Trustees, became deceased December 13, 1967, and his Executor has joined in this Report, and asks for said decedent's discharge and the discharge and release of his bondsman, which should be granted;

That the Masonic Home and School of Texas has joined in a request that The Citizens Bank of Clovis, Clovis, New Mexico, a corporation, be sole Trustee of the Trust Estate Created by the Last Will and Testament of Joe C. McClelland, deceased, effective

January 1, 1968, and the Court finds that there is no necessity for a second Trustee, and that the Trust Estate will be benefited by having a sole Trustee;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that the Annual Report of Trustees for the calendar year 1967 be and the same is hereby approved, ratified, and confirmed;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that A. W. Skarda and Lynell G. Skarda, as Executor of the Estate of A. W. Skarda, deceased, be and they each are hereby discharged and released, and their bondsman similarly be and they hereby are discharged and released;

IT IS STILL FURTHER ORDERED, ADJUDGED, AND DECREED, that The Citizens Bank of Clovis, Clovis, New Mexico, a corporation, be and it hereby is appointed as sole Trustee of the Trust Estate Created by the Last Will and Testament of Joe C. McClelland, deceased, effective January 1, 1968, and all in accordance with §48-22-18, N.M.S. 1953 Anno. without making oath or bond;

IT IS STILL FURTHER ORDERED, ADJUDGED, AND DECREED, that all powers, duties and responsibilities of the said Trustees under the orders hereinbefore made be and the same are hereby continued in full force and effect as to the sole Trustee herein, The Citizens Bank of Clovis, Clovis, New Mexico, a corporation, and the said Trustee shall continue in the management of the affairs of the said Estate with all powers and authority heretofore and herein conferred by prior orders of this Court;

IT IS FINALLY ORDERED, ADJUDGED, AND DECREED,

Appendix F

that the Trustee be and it hereby is authorized to invest such portions of the cash balance of the Trust Estate in either first mortgage real estate loans or in the United States Government Bonds as it may deem in the best interest of the Estate.

DONE at Clovis, New Mexico, this 2 day of October, 1968.

s/ illegible
DISTRICT JUDGE

APPENDIX G — RELEVANT STATUTE

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

Supreme Court, U.S.
FILED
APR 22 1994
OFFICE OF THE CLERK

No. 93-1492

In The

Supreme Court of the United States

October Term, 1993

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Petitioners,

v.

ELIZABETH McCLELLAND GANT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

MILTON S. SELIGMAN
Attorney for Respondent
Suite 1200-W Sandia Savings Building
400 Gold Ave., SW
Albuquerque, NM 87102
(505) 242-6784

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. When no probate proceedings are pending, is it proper in a diversity case for the U.S. District Court to construe a Testamentary Trust in a Will which was probated 52 years prior thereto and where the State Courts had never construed that portion of the Will or of the Testamentary Trust.

2. Does 28 U.S.C. Sec. 2202, authorize the District Court to make required adjustments in accordance with a prior declaratory judgment when the party directed to make such adjustments failed to do so, and the Court continues to find it necessary and proper.

3. Does the doctrine of preclusion or of res judicata apply to the granting of further necessary or proper relief under 28 U.S.C. Sec. 2202.

4. Does the informal waiver without notice or hearing by the supervising State Court of a testamentary requirement that there must always be two trustees in control, where only one of two beneficiaries participated in the waiver request, give the action of the Court status under the Full Faith and Credit constitutional provisions with respect to a later action by the non-requesting beneficiary to construe the number of Trustees required by the Will.

PARTIES

All parties are named in the caption.

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No. 93-1492

In The

Supreme Court of the United States

October Term, 1993

THE GRAND LODGE OF TEXAS (ANCIENT, FREE AND ACCEPTED MASONS), a corporation, as Trustee for Masonic Home and School of Texas, MASONIC HOME AND SCHOOL OF TEXAS, and THE CITIZENS BANK OF CLOVIS, NEW MEXICO, a corporation,

Petitioners,

v.

ELIZABETH McCLELLAND GANT,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

The Respondent respectfully urges that the Petition for Writ of Certiorari prayed for by the Petitioners herein be denied for the reasons hereinafter set forth.

OPINIONS BELOW

There is no need to refer to a summary of the Opinion, as the Opinion appears in full beginning on page 1a of Appendix A of Petitioner's Petition.

STATEMENT OF CASE

Respondent supplements and contradicts the Petitioners Statement of the case as follows:

Respondent contradicts the statement in the first paragraph that "the Will had already been construed . . . ", as in 1942, not only did the state Probate Court lack power to construe a Will, but such construction was not requested, and all the Probate Court did was to repeat in the Order closing the estate the language of the Will with respect to Respondent.

Respondent objects that the second paragraph of the Statement is misleading, as Citizen's Bank was already a Trustee on October 2, 1968, when the other Trustee had died, and Petitioner The Grand Lodge consented to the entry of an order continuing the Petitioner Bank as sole Trustee despite the Will requirements, which was done without any hearing and without notice to Respondent, and no opportunity for Respondent to object or impose conditions. The facts are correctly referred to in the Opinion of the Tenth Circuit Court of Appeals.

In the third paragraph the objection to the Statement is that it does not point out that the issue of a co-trustee was not actually litigated in the 1987-1988 District Court

proceedings, as also pointed out by the Circuit Court of Appeals decision.

Respondent's objection to the fourth paragraph is that in the last sentence it begs the issue, as the District Court decided that in order to comply with the Tenth Circuit decision, the Petitioner Trustee had a duty to make adjustments in compensation to Respondent in order to assure her an adequate living.

Respondent objects to the sixth paragraph, since it suggests that even passive administration of a trust, which requires no exercise of the Court's discretion or decision-making powers, is the same as assuming jurisdiction for actual administration and interpretation of the trust. In this case, the State Court had not been called upon to do anything since before 1968 but to approve stipulations made by the parties themselves, stating their own agreements, and not requesting anything by way of a decision from the Court.

REASONS FOR DENYING THE WRIT

1. There is no justification for the granting of a Writ in this case as the lower Court actually followed Supreme Court decisions as well as other Tenth Circuit decisions and carefully refrained from doing anything that would interfere with the State Court's jurisdiction whenever it was needed to be exercised. Rather than generalize, Respondent will take up the reasons with the same numbering of subject matter as contained in the Petition.

I.

There was no interference with the State Court because the supposed construction by the Probate Court never occurred and the State District Court was not controlling or exercising discretion as to estate administration, but merely acted passively when the parties would agree to the terms of an order. The appointment of Citizen's Bank as sole trustee was not the result of a request for construction of the Will, but simply the result of one of the beneficiaries requesting a variance and the other beneficiary not being consulted. It is obvious that the Will provided for two trustees and the Court of Appeals could not have construed it any differently. Petitioners' suggestions that there has been interference with the State Court is without any merit whatsoever as for many years the State Court has not been requested to exercise any discretion. The State Court might have had jurisdiction if the trustee had requested construction of the Will under the New Mexico Declaratory Judgment Act. This it failed to do and persistently failed to do. It allowed a fund to be built up from an initial cash amount of approximately $55,000 to over several million dollars during a time when the income beneficiary was forced to negotiate for whatever the remainder beneficiary would agree to in lieu of a judicial determination of "an amount sufficient to insure "Respondent" an adequate living," where each Stipulation contained a provision reserving the right of the remainder beneficiary to reduce the payments to Respondent to $1,800 per year at any time and thereupon Respondent could apply to the Court for a construction of the Will. Presumably the State Court saw these Stipulations and did nothing to correct them, and obviously the

Bank as trustee knew about them and knew about the Orders that followed the Stipulations and carried them into effect and did nothing with respect to requesting the Court to construe the Will. None of the cases cited by Petitioners support their points. They cited *Swanson v. Bates*, 170 F.2d 648 (10th Cir. 1948), a case where there was pending in the State Court a hearing on the final account and report in the case involved, and a date had been set for that hearing and, under those circumstances, the Federal Courts were held not to be able to interfere. That is an entirely different situation from the one at Bar where the State Court has not set anything for a hearing for many, many years, and there could be no interference with the State Court's jurisdiction when the Federal Court acted in a Declaratory Judgment proceeding.

II.

Both of Petitioners points mentioned here were fully dealt with in the Opinion of the Court of Appeals, as set forth under the heading "Jurisdiction" beginning in the Appendix to the Petition on pages 5a-7a. The case cited by Petitioners on page 7 is a criminal case and the principle attributed to it at the bottom of page 7 is part of dicta which contains numerous qualifications. The case involves constitutional rights and criminal prosecution for self-incrimination, after relying on the statutory waiver to allow a defendant to testify and preserve his rights.

All of the relief granted was to assure that Respondent received a sufficient amount to comply with testator's intention to ensure her an adequate living. The

language of the 1988 decision in this regard retained jurisdiction to enforce the decree, and the 1992 Order accomplishes this.

III.

Perhaps it is significant that in all of their argument under Reason No. 3 for granting the Writ Petitioners refer to Texts in general, and then to a quotation from a particular criminal case, in order to attempt to prevent the enforcement of the two-trustee provisions of the Will, and in order to avoid the payment of attorney fees for services which their own actions have made necessary. On pages 7a to 10a of Appendix A of their Petition, the Court of Appeals fully answered their contentions.

The Court's stated basis in 1992 for awarding attorney fees was on a different cause of action from that stated by Respondent in the 1986 complaint, as to which attorney fees were denied in the 1988 Judgment. Plaintiff included in her 1991 Motion for further relief substantiated statements that she expressly asked defendant Grand Lodge in January 1990 to deal directly with her to eliminate attorney fee expenses for her based on the 1988 Judgment and the use of the expert witness who had testified as to adjusting the support amount by relating it to the Consumer Price Index, and that in February 1990 the Fort Worth, Texas attorneys purporting to represent the Grand Lodge officials declined to even discuss the matters plaintiff was concerned with, stating that they were "totally satisfied with the bank's handling of the estate."

Accordingly, in 1991 the record attorney for the trustee and the Grand Lodge was duly requested by Respondent to consent to the granting of further relief, such consent was refused, and Respondent filed the Motion, the rulings upon which in her favor are the reasons for Petitioners' dissatisfaction. Petitioners forced upon Respondent the court proceedings for further construction of the Will. Such proceedings are for the benefit of the trust, as they furnish guidance as to how to handle problems in dispute. Petitioners could have but chose not to seek Court construction; Respondent was forced to do so to obtain court guidance. The Court decided that the adequate living assurance was not intended to be diminished by legal expenses forced upon Respondent by refusal of Petitioners to comply with prior Will construction by the Court, by invoking the most technical of grounds, and even then being unable to justify them. The Court of Appeals also recognized that the newly additional expenses forced upon Respondent after 1988 of litigating the construction of the Will were extraordinary expenses pertaining to different years as to which the Will required reimbursement. If not so construed, the Trustee could thwart the testators' intention by constant litigation over support for each year, using its position as a fiduciary and the ample funds of the trust to make the income beneficiary a bankrupt beneficiary.

The existence of new Trustee problems, and the reluctance to comply with decisions duly adjudicated, resulted in new issues of trustee duties brought about by Petitioners, making additional litigation expense for Respondent on matters not involved in prior rulings on entitlement to attorney fees.

It should be noted that the Court's granting of attorney fees was not based upon the quoted statutory authorizations, but upon the provisions of the Will which would require that the income beneficiary receive the intended income over and above any expenditures caused to her without her fault.

IV.

Reasons expressed by the Petitioners under this heading are a repetition of previous arguments, in effect stating that it was established in the 1988 judgment that the law of the case was that the Respondent (Petitioner in the original proceeding) should not be awarded attorney fees. In this argument at this time the Petitioners ignore the fact that attorney fees were expressly awarded for legal services subsequent to the February 10, 1988 judgment. There was no retroactive award of attorney fees.

The case that Petitioners cite in support of their argument that there is a conflict between the Tenth and the Fifth Circuit is one that is based on the lack of statutory authorization for attorney fees in the state of New York at the time of the decision. Attorney fees are authorized by statute in New Mexico and there is no conflict between the Circuits. (The reasoning of the Court, as pointed out in the discussion under the previous paragraph, was based on the requirement in the Will that the testator's granddaughter receive an amount sufficient to assure her an adequate living, over and above expenses, such as attorney fees, being forced upon her by the other parties involved. As part of the discussion of this matter, the

opinion of the Court of Appeals, as set forth in Petitioners' Appendix A on pages 9a and 10a, the attorney fees were considered extraordinary expenses by the District Court and the Court of Appeals stated "The 1992 Order thus pertained to different years, was supported by a different rationale, and was encompassed in the broad authority conveyed by section 2202.") As "icing on the cake," on page 10a the Court of Appeals pointed out that it has held in a diversity case that fees can be awarded as damages even though not recoverable under state law.

New Mexico statutes authorize the payment and awarding of attorney's fees in trust matters. Section 46-3-12.A.(3)&(4), *New Mexico Statutes Annotated*, 1978 Compilation, as Amended, provides in part:

> "A. The following charges shall be made against income: . . .
>
> (4) court costs, attorneys fees and other fees on other accountings or judicial proceedings if the matter primarily concerns the income interest, unless the court directs otherwise; . . . "

In the same Section appears the following further provision:

> "C. The following charges shall be made against principal: . . .
>
> (2) charges not provided for in Sub Section A, including . . . expenses incurred in maintaining or defending any action to construe the trust or protect it or the property or assure the title of any trust property; . . . "

V.

The argument of Petitioners under this point hardly justifies response. Since 1942 there has been a state District Court case file where the McClelland Testamentary trustees could file their annual reports and request court approval and the setting of trustees' fees. In 1968 the corporate trustee after the death of its co-trustee, requested the state Court in a non-adversarial situation to allow it to continue as sole trustee, with the remainder beneficiary's consent, and the Court agreed. The United States District Court has not challenged the 1968 decision, but has applied the appropriate principles to require an end to the departure from the terms of the Will in view of changed conditions in 1988 and thereafter. Twenty years or more after the state Court action circumstances had changed so as to call again for compliance with the strict terms of the Will. The 1968 order by the state Court did not declare that there would never be a need for a second trustee; the 1992 order of the United States District Court did not find fault with the 1968 order of the state Court, but simply found that the changed conditions justified construction of the Will in accordance with the terms specified by the testator.

It should also be noted that the Petitioners have often invoked the statute of limitations, laches, estoppel, and waiver, as against the Respondent in their attempts to prevent relief from being granted her. In the Opinion set forth in the Petition, Appendix A, on page 13a, the Tenth Circuit pointed out that only when the sole trustee failed to perform its fiduciary duties did Ms. Gant become entitled to complain of the harm to her by lack of a second trustee. Because neither the remainderman nor

the trustee has seen fit to employ their respective separate counsel, respondent cannot know whether the opposition to a second trustee is a matter of selfishness on the part of the trustee, or satisfaction on the part of the remainderman; she does know that it has meant a great burden and expense for her.

2. Some of the questions which this Court is now being requested to review were subjects of a prior similar Petition to this Court filed as Case No. 89-233, October Term 1989. They involved the "sanctity" of the 1942 state Probate Court Order and of the 1968 state District Court Order, neither of which involved a contested adjudication or anything in the nature of a declaratory judgment.

As can be observed from a look at page 6 of the prior Petition in No. 89-233, it had also been preceded by a 1989 Petition to the Tenth Circuit Court for Rehearing, and a denial of hearing en banc.

This Court denied Certiorari in 1989, and Respondent submits that Petitioners have failed to justify any different disposition in 1994.

CONCLUSION

Respondent will agree with Petitioners that "This is a classic case . . . ", but she would characterize it as one attempting to get the Supreme Court of the United States to intervene in the administration of a private trust on behalf of a trustee who will make or join in any argument or ground to prevent sharing its trust powers as specified in the Will creating the trust. It is also a case of a trustee

and a remainderman who want to litigate over the income beneficiary's rights until there is nothing left for her, without permitting the Court to carry out the judicially declared terms of the Will that she was to be assured an adequate living. Not only is this a case where this Court has no reason or time to become involved, it is one where the Respondent only wishes that in refusing to become involved this Court could express its judicial attitude toward litigation of this type, in which this is the second attempt of the Petitioners to bring these routine trust matters before this Court for a decision.

The Petition should be denied.

Respectfully submitted

MILTON S. SELIGMAN
Attorney for Respondent
Suite 1200-W Sandia Savings Building
400 Gold Ave. SW
Albuquerque, New Mexico 87102
(505) 242-6784